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No. 88-865

In The

Supreme Court of the United States

October Term, 1988

SUN EXPLORATION AND PRODUCTION COMPANY, et al.,

Petitioners,

v.

JAMES R. CONNER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal government's decision to issue onshore oil and gas leases for lands in two national forests constituted a "recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C), which requires the preparation of an environmental impact statement to accompany such a proposal.

2. Whether Section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (1982 & Supp. IV 1986), which requires each federal agency to consult with the Secretary of the Interior to ensure that any action by the agency is not likely to jeopardize any endangered or threatened species or destroy its critical habitat, permits such consultation on an incremental basis provided that it is completed prior to any irreversible and irretrievable commitment of resources.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, the Montana Wildlife Federation, James. R. Conner and the Madison-Gallatin Alliance, respectfully request that this Court deny the petition for a writ of certiorari which seeks review of the Ninth Circuit's opinion in this case. The Ninth Circuit's opinion is reported in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988). The opinion of the district court is reported at 605 F.Supp. 107 (D.Mont. 1985).

STATEMENT OF THE CASE

In February and March of 1981, the Flathead and Gallatin National Forests in Montana issued environmental assessments (EA's) setting out how oil gas leases on the two forests would be handled.[1] Under the Decision Notices and Findings of No Significant Impact which accompanied the two EA's, the Forest Service decided not to prepare environmental impact statements pursuant to the National Environmental Policy Act, 43 U.S.C. §§ 4321 *et seq.* (NEPA), even while recommending approval of lease applications covering approximately 650,000 acres on the Flathead and 193,000 acres on the Gallatin Forest.[2] In addition to approving pending leases, the EA's cleared the way for issuing leases on any new applications submitted to the two forests.

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[1] Under regulations promulgated by the Council on Environmental Quality, federal agencies are to prepare an environmental assessment (EA) in order to determine whether preparation of an environmental impact statement (EIS) is necessary. According to the CEQ regulations, an EA should 1) provide sufficient evidence and analysis for determining whether an EIS is necessary; 2) aid in an agency's compliance with NEPA when no EIS is necessary; 3) facilitate preparation of a an EIS when one is necessary; and 4) include brief discussions of the proposal, of alternatives and of the environmental impacts. 40 C.F.R. § 1508.9 (1985).

[2] The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.*, vests in the Secretary of Interior the discretion to lease federal lands for oil and gas development. The Secretary's discretionary authority is exercised by the BLM. 43 C.F.R. § 3100.0-3 (1985). Until passage of the Federal Onshore Oil and Gas

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The two national forests opened to oil and gas development by the EA's contain resources of truly national significance. The 2,364,000-acre Flathead Forest is dominated by high mountain peaks, broad river valleys, and a multitude of tumbling streams and pristine mountain lakes. Within the boundaries of the Flathead are found all or parts of three congressionally designated wilderness areas: the Great Bear, the Mission Mountains, and the nationally famous Bob Marshall. From these mountain watersheds and from Glacier National Park, which borders much of the Flathead, flow streams and creeks that form the South, Middle and North Forks of the Flathead River, all of which are components of the National Wild and Scenic Rivers System. The Flathead supports some of the finest trout fishing in the country and provides extensive habitat for many species of wildlife. In addition to elk, deer, bighorn sheep and other big game species, the Flathead is home to the peregrine falcon, the bald eagle, the gray wolf and the grizzly bear, all of which are all listed as threatened or endangered species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (ESA).

The Gallatin National Forest in southcentral Montana also has a tremendous diversity of natural resources. A

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Leasing Reform Act of 1987, the BLM forwarded lease applications received for national forest lands to the U.S. Forest Service, which in turn recommended for or against lease issuance. A Memorandum of Understanding between the two agencies gave the Forest Service responsibility for ensuring that federal environmental statutes were complied with prior to leasing. This MOU can be found at 49 Fed. Reg. 37,440 (Sept. 24, 1984.). Under the Leasing Reform Act, the BLM cannot issue any lease over the objection of the Forest Service. P.L. 100-203, § 5102 (h), 101 Stat. 1330-258.

beautiful landscape of sharp mountain peaks and broad, verdant valleys, the Gallatin contributes timber and grazing lands to local economies. Bordered on the south by Yellowstone National Park, the Gallatin is the watershed for some of the nation's most widely known trout waters, including the blue ribbon Madison River. Over 150,000 acres of the forest provide critical winter range to elk and deer, while 30,000 acres of the Gallatin have been identified as essential grizzly bear habitat.[3]

Employing boilerplate language and a nearly identical review of the effects of oil and gas leasing, the Flathead and Gallatin EA's approved lease issuance in many areas with significant resource conflicts. Leases were sold in critical big game areas such as wintering ranges and calving grounds, in riparian areas, in wild and scenic river corridors, in roadless areas eligible for inclusion in the national wilderness system, and in habitats needed by species listed under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. While some of these leases were conditioned with a "no surface occupancy" stipulation which allowed the government to later prohibit development, most of the issued leases granted the lessee the right to develop oil and gas even where other important resources were identified.[4] While both EA's suggested

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[3] These facts on the Gallatin and Flathead Forests come from the oil and gas leasing EA's at issue in this lawsuit. These EA's can be found in the Ninth Circuit's Excerpt of Record. The Flathead EA begins at p. 175 and the Gallatin EA is at p. 311.

[4] In 1976 the Flathead Forest prepared an Environmental Impact Statement on oil and gas leasing. Of the 236,000 acres covered under pending lease applications at the time, the EIS

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that some leases would be denied because of environmental considerations, in practice the Forest Service recommended approving every lease application pending on the two forests.[5]

As petitioners suggest, similar environmental assessments were prepared on public land areas throughout the West (Pet. 3-4). Indeed, apparently one EA was prepared to cover the entire Rocky Mountain Region, a Forest Service administrative unit covering every national forest in Colorado and parts of Wyoming. *See Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609, 621 (10th Cir. 1978). All of these EA's employed the same confusing logic evident in the Flathead and Gallatin EA's. Even though the Forest Service was issuing leases in sensitive areas that gave the lessee the right to extract oil and gas and to develop as much of the lease as was necessary to do this, the Forest Service concluded that lease issuance was only a paper transaction which did not require preparation of an EIS under NEPA. See e.g.,

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recommended granting leases on approximately 53,000 acres, granting leases with special stipulations on 91,000 and deferring leasing on 92,000 acres. Environmental concerns such as important big game winter ranges and grizzly habitat were the primary reasons behind the recommendation for lease deferral. This EIS was withdrawn by the Forest Service. As noted, at the time the EA at issue in this litigation was released, over 600,000 acres were covered by pending lease applications.

[5] Defendants' Response to Plaintiffs' Supplemental Interrogatories, Interrogatory No. 2.

Decision Notice and Finding of No Significant Impact, Flathead Oil and Gas EA. While the government added conditioning and limiting stipulations to many leases, the contractual right to develop found in all government leases remained in place.[6] In addition, many EA's were accompanied by biological opinions prepared pursuant to the ESA. All of these opinions found that threatened and endangered species listed under the ESA would not be jeopardized by leasing.

Both the Forest Service and the BLM were put on early notice that their approach to meeting the requirements of the NEPA and the ESA was wrong. As the record in this case shows, respondents filed administrative appeals with both the Forest Service and the BLM shortly after the EA's were released in 1981. These appeals argued that because federal leases conveyed the right to develop the leasehold, with all its attendant environmental impacts, NEPA required preparation of an EIS prior to lease issuance. Once the Forest Service and the BLM rejected these administrative appeals, respondents initiated this lawsuit in early 1982.

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[6] The standard lease form used on both national forest and BLM lands grants to the lessee:

> the exclusive right and privilege to drill for . . . remove and dispose of all the oil and gas deposits . . . in the lands and maintain thereupon all works, buildings . . . roads . . . or other structures necessary to the full enjoyment thereof, for a period of 10 years, and so long thereafter as oil and gas is produced in paying quanities.

U.S. Dept. of Interior, BLM Lease for Oil and Gas, Form 3110-2.

As this litigation was moving through federal district court in the District of Montana, other parties were suing the BLM and the Forest Service over their leasing practices in other jurisdictions. In September 1983, the U.S. Court of Appeals for the District of Columbia held that the government's approach to oil and gas leasing was illegal because it failed to conform with the requirements of NEPA. In *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), a case involving oil and gas leases issued in Wyoming, the court found that unless leases were conditioned so as to reserve to the government the right to later deny activity on the leasehold, the basic terms of the standard oil and gas lease committed the government to allowing development to occur. Since oil and gas development would likely cause significant environmental impacts to federal lands, the court held that NEPA required the preparation of an EIS prior to such an irreversible and irretrievable commitment of federal resources. *Peterson*, 717 F.2d at 1414.[7] The Federal District Court for Montana closely followed the *Peterson* precedent in *Conner v. Burford*, 605 F.Supp. 107 (D. Mont. 1985) in 1985 and in a closely related case, *Bob Marshall Alliance v. Watt*, 685 F.Supp 1514 (D. Mont. 1986), in 1986.

As the government was appealing *Conner v. Burford*, the Court of Appeals for the Tenth Circuit issued its opinion in *Park County Resource Council v. U.S. Department*

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[7] The court's concerns with the "irreversible and irretrievable commitments of resources" comes from the language of NEPA itself, which expressly requires environmental impact statements to analyze such commitments. *See* 42 U.S.C. § 4332 (2)(C)(v).

of Agriculture, 817 F.2d 609 (10th Cir. 1987). *Park County* was the first case to sustain the government's oil and gas leasing procedures, and it did so from a far different set of facts than those found in either *Peterson* or *Conner*.[8] While both *Peterson* and *Conner* were filed as soon as the leases were issued and administrative remedies were exhausted, plaintiffs in *Park County* failed to challenge the leases until the lessee sought to drill a well four years later. The Tenth Circuit did not consider the case until after the well had been drilled and no oil or natural gas discovered. Unlike most situations, the Forest Service prepared an EIS on the well. *Park County*, 817 F.2d at 612-616.[9] While the Tenth Circuit recognized these facts in the *Park County* opinion, the posture of the case was far different from that found in the earlier cases.

A final opinion in *Conner* was issued by the Court of Appeals for the Ninth Circuit on July 1, 1988. *Conner v. Burford*, 848 F.2d 1441. This opinion held that the Forest Service and BLM had failed to comply with NEPA and the ESA in issuing oil and gas leases on the Flathead and Gallatin Forests. The United States chose not to seek further review through a Petition for Writ of Certiorari. A

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[8] The Federal District Court which considered *Park County* reached the merits of the leasing issue only in dicta because it barred the leasing challenge on three procedural grounds. *See Park County Resource Council v. U.S. Dept. of Agriculture*, 613 F.Supp. 1182 (D.Wyo. 1985).

[9] One of the arguments respondents made in *Conner* before the District Court was that the adequacy of environmental review after leases were issued was extremely uncertain. For years, the Bureau of Land Management "categorically excluded" applications for permits to drill (APD's) from all NEPA compliance, including preparation of EA's or EIS's. 516 Dept. Man. 2.B(1)(A) promulgated at 46 Fed. Reg. 7487 (1981).

group of oil and gas companies, who intervened in *Conner* after the District Court issued its opinion in 1985, are seeking Supreme Court review.

REASONS WHY THE WRIT SHOULD BE DENIED

I. INTRODUCTION

In their framing of the two questions which they present for review, petitioners show their preoccupation with acquiring oil and gas leases and their lack of interest in establishing an orderly and environmentally sound process for developing the nation's public resources. The Petition for a Writ of Certiorari presently before the Court is about two separate issues. The first issue concerns the process of leasing federally owned oil and gas as authorized by the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq*. Because the MLA sets out only a loose framework for leasing federal minerals, and vests in the Secretary of Interior considerable discretion in establishing a workable approach to leasing, the federal government's leasing program has changed often. In the past 10 years, this process has accelerated as federal land management agencies have responded to a variety of environmental, corporate, legal and political concerns and pressures. Rather than conforming to this evolution of the leasing process, petitioners seek to reinstitute an old and abandoned version, which, while it benefited oil and gas companies, has been successively abandoned by federal land management agencies and Congress.

The second issue concerns two important environmental statutes, the National Environmental Policy Act and the Endangered Species Act, and how they should be applied to federal agency actions, regardless of whether oil and gas leasing or some other activity is involved. When this issue is isolated from the leasing process, petitioners' claims that the federal courts are irreconcilably divided in their interpretation of both statutes fades away. On the NEPA question, the facts surrounding the government's oil and gas leasing effort were framed differently by the federal circuit courts. From this disparate factual evaluation, the courts reached different, but not necessarily opposite legal conclusions. On the ESA questions, a close examination of the law clearly shows that no conflict exists between the circuit courts. Petitioners' Writ should be denied.

II. THE CIRCUMSTANCES SURROUNDING OIL AND GAS LEASING HAVE CHANGED AS BOTH CONGRESS AND THE FEDERAL LAND MANAGEMENT AGENCIES HAVE MODIFIED THE FEDERAL ONSHORE OIL AND GAS LEASING PROGRAM.

A. The Federal Land Management Agencies with Oil and Gas Leasing Responsibilities Have Changed How They Evaluate Oil and Gas Leasing Proposals.

Petitioners suggest in their Statement of Facts that the EA's issued on the Flathead and Gallatin Forests were part of a well thought out process of review and that the BLM and the Forest Service have "long employed a tiered environmental review process to evaluate oil and gas

program proposals to issue leases . . . " Pet. 2-3. Petitioners also note that "[p]roposals to issue leases are routinely evaluated . . . by reference to land management plans covering the lands that may be leased. . . ." *Id.* Implicit in these statements is the suggestion that the leasing process has been stable and unchanging. Neither the statements nor the suggestion are accurate.

First, although the BLM and the Forest Service have a tiered environmental review process in place today, at the time the Flathead and Gallatin EA's were issued in 1981, they stood alone as the only reviews undertaken by the two forests of the potential impacts of oil and gas leasing. Under the authority of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.* and the National Forest Management Act (NFMA), 16 U.S.C. §§ 1601, 1604, both the BLM and the Forest Service have been preparing comprehensive land use plans on many forests and public land areas. Many of these plans, especially in areas with high oil and gas potential, have reexamined both oil and gas leasing and its potential environmental impacts. However, most BLM and Forest Service land use plans were issued several years after oil and gas leasing EA's had been released and thousands of leases issued. The Flathead did not release a draft Forest Plan until 1983, and a final plan was not approved until 1986. The final Gallatin Plan was not approved until 1987. The facts show that no tiered process of NEPA review existed when the Flathead and Gallatin oil and gas leasing EA's were approved.

In addition to new land use planning efforts on the nation's public lands, the criteria for reviewing oil and gas leases have also changed. In 1986, the BLM issued a

"supplemental program guidance" to be incorporated into the agency's land use planning process. BLM Manual 1624.01-1624.52. Among other requirements, BLM plans now must clearly identify lands open and closed to leasing, identify areas where certain types of stipulations will be attached to any leases issued and, perhaps most importantly, identify the "cumulative environmental impacts of reasonably foreseeable fluid mineral development for each plan alternative analyzed in detail." BLM Manual 1624.22 B. None of these requirements were in place at the time the Flathead and Gallatin EA's were issued, and neither EA contains this information.

Since issuing this program direction, the BLM, and more recently, the Forest Service, have begun an ambitious effort to bring all land use plans into compliance with these new standards by 1991.[10] These new instructions reflect far greater attention to NEPA's requirements and show that the agencies are attempting to meet the standards set out by the federal courts in this lawsuit.

As a result of these modifications, the oil and gas leasing process has changed dramatically since the early 1980's when the BLM and the Forest Service relied solely on environmental assessments for a massive leasing program across the West. On most national forests and BLM districts, comprehensive land use plans have been or will soon be completed, and oil and gas development has

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[10] On June 24, 1988, the Director of the BLM issued a memo requiring that "all existing plans will be brought into compliance with BLM Manual Section 1624.2 as expeditiously as possible." *See* Memo from BLM Director to State Directors, June 24, 1988.

been integrated, to some extent, with other resource values. In many areas, even these relatively recent management plans are being revised to further consider oil and gas issues. In only a few areas are EA's of the sort the Ninth Circuit found inadequate in *Conner* being used as exclusive justification for oil and gas leasing, and these areas also will soon be addressed by federal land management agencies.

B. Congress Has Changed the Federal Onshore Oil and Gas Leasing Program.

In late 1987, Congress passed the Federal Onshore Oil and Gas Leasing Reform Act, Pub. L. 100-203, 101 Stat. 1330-256. This law, which amends the Mineral Leasing Act, has substantially changed the framework under which oil and gas leasing takes place and has required both the BLM and the Forest Service to rework their mineral leasing programs.

Until passage of the 1987 amendments, two types of oil and gas leases existed under the MLA. Where oil and gas reserves were known to exist – a "known geologic structure" – the MLA provided for competitive bidding in the issuance of all federal leases. *See* 30 U.S.C. § 226(b) (1982). On the vast majority of federal lands where little was known about oil and gas reserves, the MLA authorized the issuance of noncompetitive leases on a first-come, first-serve basis. 30 U.S.C. § 226(c). The 1987 law changed the MLA by requiring all leases to be first offered on a competitive basis. P. L. 100-203, § 5102(a), 101 Stat. 1330-256. Lease tracts can only be acquired through noncompetitive means when they fail to receive a minimum competitive bid of at least $2 per acre. *Id.* at § 5102(b) and (c), 101 Stat. 1330-257. In addition to these

changes in how leases can be acquired, the 1987 amendments prohibit the Secretary of Interior from issuing any lease on national forest lands over the objection of the Secretary of Agriculture. *Id.*, at § 5102(h), 101 Stat. 1330-258.

These amendments have caused significant changes in the leasing process. Prior to 1987, most leases were issued noncompetitively at the initiation of the potential lessee. Under the old system, oil and gas companies and speculators filed noncompetitive lease applications for tracts that they had identified, and the BLM and the Forest Service responded accordingly. Under the new system, the BLM and the Forest Service initiate the process by identifying and offering tracts at quarterly auctions. *Id.* at § 5102(a), 101 Stat. 1330-256. Prior to making such tracts available, the agencies consult their land use plans and environmental documents in order to meet their other statutory responsibilities.

In addition to requiring an all-competitive leasing system, the 1987 amendments significantly expanded the Forest Service's authority over oil and gas leasing. Prior to obtaining this new authority, the Forest Service merely provided non-binding advice on BLM leasing decisions, even while it was the "general practice of the BLM to accept Forest Service recommendations."[11] In response to this newly acquired responsibility, the Forest Service is presently developing its own rules and regulations

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[11] An explanation of how the Forest Service and the BLM shared leasing responsibilities prior to the passage of Pub. L. No. 100-203, is contained in footnote 2.

for mineral development. As of this time, however, these new regulations have not appeared in the Federal Record.

The Onshore Oil and Gas Leasing Reform Act has caused important changes in how oil and gas is leased by federal land management agencies. Some of these amendments are still being implemented as the agencies develop new regulations. Nonetheless, the combined effects of the Leasing Reform Act and the modifications in the oil and gas leasing process instituted by the BLM and the Forest Service over the past several years are profound. While petitioners may wish to return to a day when whole national forests were leased to oil and gas development on the basis of a simple EA, the Forest Service and the BLM, in part because of the pressures of this litigation, abandoned this approach long ago. Until NEPA and the ESA have been fully integrated with these changes, it would be premature for this Court to review these laws in the context of the government's oil and gas program.

III. THE NEPA HOLDING IN *CONNER V. BURFORD* IS CONSISTENT WITH OTHER JUDICIAL INTERPRETATIONS AND DOES NOT WARRANT REVIEW BY THIS COURT.

Under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, all federal agencies are required to prepare a detailed statement of environmental impacts on "proposals . . . for major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). While NEPA is primarily a procedural statute, *Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980), it is designed to ensure

that environmental concerns are "integrated into the very process of agency decisionmaking." *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). To give effect to this purpose, the environmental impact statements required by NEPA must be completed at the time a proposal is made and prior to a federal agency actually taking action. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976), *accord Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 320 (1975).

Petitioners assert that there is an irreconcilable division between the Courts of Appeals for the Ninth Circuit and the District of Columbia and the Court of Appeals for the Tenth Circuit over NEPA and oil and gas leasing. While there can be no argument that the two courts reached different conclusions in somewhat similar cases, the division is based not on a fundamentally different view of the law but in the courts identifying completely different proposals for action.

In *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), and *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983), the courts focused on the proposal to issue oil and gas leases on thousands of acres of national forest land.[12] In their examination, both courts found that essentially two types of leases were issued on the two forests. For some leases the government required the lessee to accept a "no surface occupancy stipulation" (NSO) that allowed the surface management agency to "absolutely forbid the lessee

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[12] As noted, the Flathead and Gallatin EA's at issue in *Conner v. Burford* examined leasing proposals on over 600,000 acres of land on each Forest. The leasing program before the Court in *Sierra Club v. Peterson* covered 27,000 acres.

from occupying or using the surface of the leased land" unless a modification was specifically approved. *Conner*, 848 F.2d at 1447. *Sierra Club v. Peterson*, 717 F.2d at 1412. For these lands, the courts held that an EIS was unnecessary because the government reserved the right to later evaluate all surface use alternatives and thus made no irretrievable commitment of resources. *Conner* at 1448-51.

Where the leasing proposal changed, and NSO stipulations were not attached to the leases, the courts reached a different legal conclusion about what NEPA requires. For such leases, the courts found that while the government retained sufficient authority to impose reasonable mitigation, the government had abandoned the right to preclude development. *Id.* at 1448-51; *Peterson*, 717 F.2d at 1414-15. Given such facts, the courts held that the leasing proposal constituted a "point of commitment" because after the lease is sold, the government cannot prohibit "potentially significant inroads on the environment." *Conner* at 1451. Under NEPA, both courts held that the government must prepare an EIS prior to making an irretrievable commitment of resources. *Id.* at 1451; *Peterson*, 717 F.2d at 1414.

The Tenth Circuit, in *Park County Resource Council v. U.S. Department of Agriculture*, 817 F.2d 609 (10th Cir. 1987), looked not at the leasing proposals being made by the Forest Service and the BLM, or at the rights conferred through an award of a lease, but at the lack of actual proposals for oil and gas projects which existed when the leases are sold. *Id.* at 622-23. The court reasoned that this absence of concrete proposals excused the agencies from preparing an EIS at the leasing stage. *Id.* at 622. The court made no findings on the rights being conferred through

lease issuance or whether the government was irrevocably committed to allowing oil well development to occur because of the terms found in the lease. Because the Tenth Circuit examined not the leasing proposal but the absence of specific oil and gas development proposals, the court reached a different, but not necessarily opposite, legal conclusion from the other Courts of Appeals.

While petitioners dwell on the Tenth Circuit's conclusion that an EIS need not be prepared prior to leasing, they fail to distinguish the different factual focuses of the courts. While respondents believe that the Tenth Circuit should have addressed the leasing proposal and examined the rights conveyed by the government to oil and gas lessees, they have no way of knowing whether or how the leasing issue was presented to the court in *Park County*. Respondents only know that the leasing proposal was the central issue in *Conner v. Burford*. Yet regardless of how the issues were presented in *Park County*, the decision in the case nowhere rejects the proposition, adopted in *Conner* and in *Peterson*, that NEPA requires government agencies to prepare an EIS on proposals prior to making an irrevocable commitment of resources.

Both *Peterson* and *Conner* rely upon well established precedent which holds that NEPA's EIS requirements are triggered whenever the government proposes to make an irretrievable commitment to development through a lease or other written instrument. Even where the exact contours of the development are uncertain, the courts have recognized that NEPA requires preparation of an EIS on such proposed government actions. *Environmental Defense Fund v. Andrus*, 596 F.2d 848, 852-53 (9th Cir. 1979); *Scientists Inst. for Public Information, Inc. v. Atomic Energy*

Comm'n, 481 F.2d 1079, 1094 (D.C. Cir. 1973); *South Dakota v. Andrus*, 614 F.2d 1190, 1194-95 (8th Cir. 1980). The courts have reasoned that absent this focus on the point of agency commitment, the other goals of NEPA would be subverted because alternative courses of action would be foreclosed and avoidable environmental impacts would be incurred. *Port of Astoria v. Hodel*, 595 F.2d 467, 478 (9th Cir. 1979). Or, as one court put it, "NEPA- . . . does not authorize defendants to meet their responsibilities by locking the barn door after the horses are stolen." *Lathan v. Volpe*, 350 F.Supp. 262, 266 (W.D. Wash. 1972) *as cited in Cady v. Morton*, 527 F.2d 786, 794 (9th Cir. 1975).

In their writ, petitioners also claim that the holding in *Sierra Club v. Peterson* is inconsistent with another NEPA opinion issued by the Court of Appeals for the District of Columbia, *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (Pet. 16-17). Again, petitioners fail to recognize that a different analysis of the facts may lead to a different result in law. In the case, the Forest Service examined a proposal to allow exploratory drilling in a wilderness area located in northwestern Montana and concluded that an EIS was not required. The case contains absolutely no discussion of whether or not approval of the exploratory permit committed the government to allowing later development activities, and a plain reading of the opinion indicates that this was not an issue before the court. The case would only be inconsistent with *Sierra Club v. Peterson* if it had allowed the government to forgo preparing an EIS even while an irrevocable decision to

allow development was made in approving the exploration permit.

Petitioners assert that *Conner v. Burford* is inconsistent with other NEPA holdings. However, as the foregoing arguments demonstrate, *Conner*'s NEPA analysis is not inconsistent with either of the principle cases cited by petitioners or with the great weight of judicial interpretation. Indeed, the reasoning in *Conner* follows a long line of well established precedent. The NEPA holdings of *Conner v. Burford* do not warrant review by this Court.

IV. THE COURTS OF APPEALS HAVE NOT ESTABLISHED CONFLICTING REQUIREMENTS UNDER THE ENDANGERED SPECIES ACT FOR OIL AND GAS LEASING.

Under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, federal agencies are required to consult with the U.S. Fish and Wildlife Service (FWS) whenever they embark on an action which may affect any species listed as threatened or endangered under the law. 16 U.S.C. § 1536(a)(2). Where such consultation takes place, FWS prepares a "biological opinion" and determines whether the action will jeopardize any listed species. 50 C.F.R. § 402. Federal agencies are prohibited from taking action that will cause such jeopardy. 16 U.S.C. § 1536(a)(2).

In *Conner v. Burford*, the Court of Appeals for the Ninth Circuit reviewed two biological opinions which FWS prepared on the proposed leasing actions on the Flathead and Gallatin Forests. Both Forests are inhabited

by the endangered gray wolf,[13] the endangered bald eagle, the endangered peregrine falcon, and the threatened grizzly bear. 50 C.F.R. § 17.11 (1987). The FWS biological opinions on the leasing proposals gave no consideration to the potential impacts of oil and gas development, but instead were limited to the leasing transaction. In its decision, the Ninth Circuit held that such circumscribed reviews were not allowed under the ESA and ordered FWS to prepared biological opinions that assessed the potential environmental impacts of post-leasing activities. *Conner v. Burford*, 848 F.2d at 1453-58.

A. The Tenth Circuit Court of Appeals Has Not Ruled on How the Endangered Species Act Applies to Oil and Gas Leasing.

Petitioners argue that the Tenth Circuit has affirmed the "government's long-standing procedures" for reviewing proposed oil and gas leases under the ESA and infer that *Conner* is in conflict with the Tenth Circuit standard (Pet. 18-19). This argument is patently false. Other than to note that the ESA was raised in the case, the Circuit Court opinion in *Park County* makes no mention of the Endangered Species Act and makes no holding whatsoever on how ESA review of oil and gas leasing should be structured.

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[13] While wolves are listed under the ESA on the Gallatin, they were eradicated from that forest around the turn of the century. FWS proposes to reintroduce wolves to Yellowstone National Park and expects that this step will lead to wolves again inhabiting the Gallatin Forest. *See* Rocky Mountain Wolf Recovery Plan, FWS 1987.

The District Court opinion in *Park County* did review a biological opinion prepared under the ESA. *See Park County Resource Council v. U.S. Department of Agriculture*, 613 F.Supp. 1182, 1188 (D.Wyo. 1985). While it is not entirely clear what biological opinion the District Court looked at, it appears that the opinion was prepared on an application for an exploratory well and not on the issuance of oil and gas leases.[14] Regardless, the District Court decision contains no discussion of what issues were considered by FWS or of the requirements of the ESA. *Id.* at 1188. Based on the District Court's published opinion, it cannot be argued that it is inconsistent with what the Ninth Circuit required of FWS in *Conner v. Burford*.

B. No Conflict Exists Between the Courts of Appeals On How The Endangered Species Act Applies to the Oil and Gas Leasing Program.

In addition to their unfounded assertions concerning the Tenth Circuit's interpretation of the ESA, petitioners cite three other opinions which they argue are inconsistent with *Conner v. Burford*. An honest reading of these opinions demonstrates that *Conner* addresses different facts and different law, and that no inconsistency exists between the Courts of Appeals on the ESA.

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[14] In *Park County*, the oil and gas leases were issued several years before the litigation was initiated. The EA on oil and gas leasing was issued in 1979, and the leases themselves were sold in 1982. In 1983, an application for a permit was filed and the Forest Service prepared an EIS. In its discussion on the ESA, the District Court mentions only an EIS, suggesting that the court never reviewed any biological opinion prepared on the leasing EA.

According to petitioners, *Cabinet Mountain Wilderness/Scotchman's Peak Grizzly Bear v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) also "affirmed the government's long-standing ESA review procedures." Pet. 19. Yet, as noted above, *Cabinet Mountains* did not involve oil and gas leasing but rather an exploratory drilling proposal for hard rock minerals. *Cabinet Mountains*, 685 F.2d at 679. Given this factual setting, the questions considered in the case in no way resemble the issues before the court in *Conner*. In *Conner*, the issue considered by FWS in its biological opinion, and reviewed by the Ninth Circuit, was whether oil and gas leasing could affect listed species. It is impossible to compare this question with a proposal to explore for hard rock minerals.

The other cases relied upon by petitioners, *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980) and *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984), present issues more similar to those before the *Conner* court. Both *North Slope* and *False Pass* involved oil and gas leasing on outer continental shelf lands in Alaska. In both cases, the courts excused FWS from preparing a biological opinion to consider the post-leasing effects of oil and gas development. Both courts, however, rested their conclusions on the legal framework of the Outer Continental Shelf Leasing Act, 43 U.S.C. §§ 1331 *et seq.*, and it is at this point that the factual backdrop begins to differ from *Conner*. Under OCSLA, the law expressly segments the leasing, exploration and development phases of oil and gas development, and the approval of any one segment in no way commits the government to approval of the others. 43 U.S.C. § 1337(a); 43 U.S.C. § 1340(b) and 43 U.S.C. § 1351(a)

The degree of control which the government retains throughout the OCSLA process was heavily relied on in both *False Pass* and *North Slope Borough* to justify a relaxed ESA standard. In *False Pass*, the court wrote: "Under the plain language of OCSLA, the purchase of a lease entails no right to proceed . . . the lessee acquires only a priority in submitting plans to conduct those activities." *False Pass*, 733 F.2d at 608. In *North Slope Borough* the court stated: "the ESA mandate that no endangered life be jeopardized must be measured in view of the full contingent of OCSLA checks and balances and all mitigating measures adopted in pursuance thereof." *North Slope Borough*, 642 F.2d at 609. It was only because of the unique structure of OCSLA that the courts allowed FWS to limit the biological opinions to the leasing stage and to segment the ESA.

In contrast, the court in *Conner* was confronted not with leasing under OCSLA, but with leasing under the Mineral Leasing Act, 30 U.S.C. §§ 181 *et seq.*, which contains none of the statutory protections relied upon by the courts in *False Pass* and *North Slope Borough*. *Conner*, 848 F.2d at 1456-57. It was the absence of these statutory guarantees and the lack of any direct or indirect conflict in the duties imposed by the MLA and the ESA that led to the conclusion in *Conner*. As the Court stated:

> The MLA contains no system of "checks and balances" similar to OCSLA's. Thus there is no tension between the MLA and the ESA and hence we find no justification to obviate the ESA's congressional mandate that a comprehensive biological opinion be prepared in this case.

Conner v. Burford, 848 F.2d at 1457. Under the ESA, biological opinions must be comprehensive and must consider the best available scientific and commercial data. The biological opinions on oil and gas leasing on the Gallatin and the Flathead Forests, by their own admission, did not meet this requirement. Given the clear requirements of the ESA, the *Conner* court held, FWS could not be excused from law. *Id.* at 1454. As the court wrote, "to hold otherwise would eviscerate Congress' intent to 'give the benefit of the doubt to the species.'" *Id.* at 1454.

As is evident from the analysis in *Conner*, no conflict exists between the Circuits as to the application of the Endangered Species Act to oil and gas leasing. The opinion itself carefully reviews all of the cases relied upon by petitioners and carefully sets out the logic and reasoning behind the decision. Given the factual distinctions with *Cabinet Mountains* and the different statutes at issue in *False Pass* and *North Slope Borough*, it is evident there is no need for this Court to review the ESA holding in *Conner v. Burford*.

CONCLUSION

Petitioners conclude by asserting that the federal government's oil and gas leasing program is in chaos because of the *Conner* decision. While this contention has little relevance to the legal issues which this Court must confront, petitioners cite many statistics showing that the oil and gas industry is actively leasing, exploring and developing public lands in this country, even in the wake

of the *Conner* opinion. As respondents have recognized, the process employed by the Forest Service and the BLM for leasing public lands is not static. No doubt some of the changes that have occurred in recent years are of deep concern to petitioners. But these changes in no way warrant consideration by this Court of the NEPA and ESA issues that were decided in *Conner v. Burford*.

Respectfully submitted,

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